Karip Mohd Salleh & Ors v Lembaga Kemajuan Tanah Persekutuan (FELDA) & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO N-01-(W)-268–08 OF 2015
ABANG ISKANDAR, ZAMANI A RAHIM AND ZALEHA YUSOF JJCA
31 MARCH 2017

Civil Procedure — Appeal — Appeal against judgment of High Court — Whether trial judge committed no appealable error that warranted appellate intervention

The appellants, who were settlers in FELDA land schemes, sued the respondents for special, general and exemplary damages for fraud, conspiracy to defraud and breach of trust contending that the respondents fraudulently colluded to deprive them of a fair price for the sale of their oil palm produce. The appellants claimed the first respondent ('FELDA') contractually required them to sell their fresh fruit bunches ('FFB') only to mills operated by the second respondent ('FPI') and because the respondents fully controlled the FFB grading process and the palm oil extraction rates, irregularities in the way the oil extraction rates were applied caused the appellants to receive less returns on their FFB than what was rightly due to them. The appellants contended that FPI initially based the FFB price on the actual oil extraction rate regardless of the quality of the fruits sent to the mills but later determined the price based on the quality of the FFB after it was graded and the graded extraction rate ('KPG') was determined. The appellants alleged that the KPG was fraudulently lowered. The High Court dismissed the appellants' claim holding that: (a) they had no locus standi to sue since they had not proven that each of the appellants was a FELDA settler who had sold his/her FFB to the respondents; (b) the claims for fraud, conspiracy to defraud and breach of trust were not proven; (c) the claims against the respondents were time-barred under s 6 of the Limitation Act 1953 ('the Act') while, as against FELDA, the claims were also time-barred under s 2 of the Public Authorities Protection Act 1948; (d) the appellants' relationship with FELDA was only contractual and not based on any trust or fiduciary relationship; (e) the appellants were guilty of laches in pursuing their claim which prejudiced the respondents in their ability to properly defend the suit; and (f) the appellants failed to prove the quantum of damages they had purportedly suffered. In the instant appeal against the High Court's decision, the appellants argued that: (i) the trial court was wrong in its findings on locus standi, limitation and quantum of damages; (ii) the evidence showed that the respondents had committed breach of fiduciary duty and equitable fraud; and (iii) the appellants had established a prima facie case which the respondents had failed to rebut.

Held, dismissing the appeal:

(1) No appealable error was committed by the trial judge that warranted appellate intervention. The trial judge had correctly and properly decided the matter. None of the grounds canvassed by the appellants had any merit (see para 56).

(2) The appellants' cause of action against the respondents was statute-barred under s 6 of the Act as the six-year limitation period applied to the claims for fraud and/or conspiracy to defraud. The appellants failed to establish any breach of trust let alone a fraudulent breach of trust. Hence, the trial judge correctly held that s 22(1)(a) of the Act — which dealt with fraudulent breach of trust — did not apply (see paras 50–51).

(3) Section 22 of the Act clearly recognised that the court had equitable jurisdiction to refuse relief on the ground of laches. The appellants, in commencing their claim in 2010 for matters that purportedly went as far back as 1995 or 1998, had prejudiced the respondents' position as they had lost the evidence necessary to meet the claim. The appellants had slept on their rights. Although it was alleged during the trial that as early as August 2001 the second respondent had fraudulently reduced the KPG, no suit was instituted and the appellants allowed nine years to lapse before they filed their action against the respondents (see para 52).

(4) The appellants' statement of claim never pleaded any breach of fiduciary duty. The trial judge held that the appellants were estopped from making submissions on breach of fiduciary duty as the parties were bound by their pleadings. In any event, the respondents did not owe the appellants any fiduciary duty in the sale and purchase of the FFB. The obligation to sell the FFB to a mill selected by FELDA was contained in cl 9 of the *surat perjanjian* and the grading was conducted by MPOB certified graders. The trial judge correctly decided that the relationship between FELDA and the settlers was contractual and that it was not a trust relationship (see paras 26–27).

(5) The appellants failed to provide any evidence whatsoever during the trial to show that each and every appellant had sent their FFB to the second respondent's mill. The trial judge duly evaluated the relevant evidence and concluded that the appellants had no locus standi. The appellants' challenge against this finding of the trial judge was misconceived (see para 18).

(6) The appellants failed to establish during the trial that any of the KPG was wrong. Even the appellants' own witnesses, when cross-examined, admitted that it was within the range stated in the Malaysian Palm Oil Board's Manual (see para 41).

(7) The appellants failed to prove fraud against the respondents on balance of probabilities or to present a prima facie claim. They also failed to establish the quantum of damages for their period of claim because they failed to prove the quantity of FFB purportedly sold by each of the appellants to the respondents or to show the purported 'shortfall' between the 'proper' KPG and the KPG given or to show the monthly/daily price of FFB for the percentage of shortfall for the period of claim (see paras 32 & 53).

[Bahasa Malaysia summary

Perayu-perayu, yang mana adalah peneroka dalam skim tanah FELDA, menyaman responden-responden untuk ganti rugi khas, am dan teladan bagi fraud, berkomplot untuk menipu dan pecah amanah berhujah bahawa responden-responden secara fraud berpakat sulit untuk menafikan mereka harga adil bagi jualan keluaran minyak kelapa sawit mereka. Perayu-perayu mendakwa responden pertama ('FELDA') secara kontrak mengkehendaki mereka untuk menjual tandan buah segar mereka ('FFB') hanya kepada kilang-kilang yang dioperasi oleh responden kedua ('FPI') dan kerana responden-responden mengawal sepenuhnya proses pengredan FFB dan kadar pengekstrakan minyak kelapa sawit, luar aturan dalam cara kadar pengekstrakan minyak diguna pakai menyebabkan perayu-perayu menerima pulangan kurang ke atas FFB mereka daripada apa yang mereka berhak dapat daripadanya. Perayu-perayu berhujah bahawa FPI pada mulanya berdasarkan harga FFB tersebut ke atas kadar pengekstrakan minyak sebenar tanpa mengira kualiti buah-buahan yang dihantar ke kilang-kilang tetapi kemudiannya menentukan harga berdasarkan kualiti FFB tersebut selepas ia digredkan dan kadar pengekstrakan gred ('KPG') ditentukan. Perayu-perayu mendakwa bahawa KPG telah dikurangkan secara palsu. Mahkamah Tinggi menolak tuntutan perayu-perayu dengan memutuskan bahawa: (a) mereka tidak mempunyai locus standi untuk menyaman memandangkan mereka tidak membuktikan bahawa setiap perayu-perayu adalah peneroka FELDA yang telah menjual FFBnya kepada responden-responden; (b) tuntutan-tuntutan untuk fraud, komplot untuk menipu dan pecah amanah tidak dibuktikan; (c) tuntutan terhadap responden-responden dihalang masa di bawah s 6 Akta Had Masa 1953 ('Akta') sementara, terhadap FELDA, tuntutan-tuntutan tersebut juga dihalang masa di bawah s 2 Akta Perlindungan Pihak Berkuasa Awam 1948; (d) hubungan perayu-perayu dengan FELDA hanya kontraktual dan bukan berdasarkan atas apa-apa hubungan amanah atau fidusiari; (e) perayu-perayu adalah salah terhadap *laches* dalam memburu tuntutan mereka yang mana memprejudiskan responden-responden dalam keupayaan mereka untuk membela tindakan tersebut dengan betul; dan (f) perayu-perayu gagal membuktikan kuantum ganti rugi yang telah dikatakan ditanggung oleh mereka. Dalam rayuan ini terhadap keputusan Mahkamah Tinggi, perayu-perayu berhujah bahawa: (i) mahkamah bicara adalah salah dalam dapatannya atas locus standi, had masa dan kuantum ganti rugi; (ii) keterangan menunjukkan bahawa responden-responden telah melakukan pelanggaran

kewajipan fidusiari dan fraud ekuiti; dan (iii) perayu-perayu telah membuktikan kes prima facie yang mana responden-responden telah gagal untuk mematahkan.

Diputuskan, menolak rayuan:

(1) Tiada kesilapan yang boleh dirayukan telah dilakukan oleh hakim bicara yang mewajarkan campur tangan mahkamah rayuan. Hakim bicara telah dengan betul memutuskan perkara tersebut. Tidak satupun alasan-alasan yang dirayukan oleh perayu-perayu mempunyai apa-apa merit (lihat perenggan 56).

(2) Kausa tindakan perayu-perayu terhadap responden-responden adalah dihalang statut di bawah s 6 Akta memandangkan tempoh had masa enam tahun terpakai kepada tuntutan-tuntutan untuk fraud dan/atau berkomplot untuk menipu. Perayu-perayu gagal untuk membuktikan apa-apa pecah amanah apatah lagi pecah amanah palsu. Maka, hakim bicara dengan betul memutuskan bahawa s 22(1)(a) Akta — yang berurusan dengan pecah amanah palsu — tidak terpakai (lihat perenggan 50–51).

(3) Seksyen 22 Akta jelas menerima bahawa mahkamah mempunyai bidang kuasa ekuiti untuk menolak relief atas alasan laches. Perayu-perayu, dalam memulakan tuntutan mereka pada tahun 2010 untuk perkara yang dikatakan berlaku sejak 1995 atau 1998, telah memprejudiskan kedudukan responden-responden kerana mereka telah hilang keterangan yang diperlukan untuk memenuhi tuntutan tersebut. Perayu-perayu tidak mengguna pakai hak mereka. Walaupun ia didakwa semasa perbicaraan seawal Ogos 2001 responden kedua telah secara palsu mengurangkan KPG, tiada tindakan dimulakan dan perayu-perayu membenarkan masa luput sembilan tahun sebelum mereka memfailkan tindakan mereka terhadap responden-responden (lihat perenggan 52).

(4) Pernyataan tuntutan perayu-perayu tidak pernah memplidkan apa-apa pelanggaran kewajipan fidusiari. Hakim perbicaraan memutuskan bahawa perayu-perayu diestop daripada membuat penghujahan atas pelanggaran kewajipan fidusiari memandangkan pihak-pihak terikat oleh pliding mereka. Walau bagaimanapun, responden-responden tidak menanggung apa-apa kewajipan fidusiari terhadap perayu-perayu dalam jual beli FFB tersebut. Tanggungjawab untuk menjual FFB tersebut kepada kilang yang dipilih oleh FELDA terdapat di dalam klausa 9 surat perjanjian dan pengredan dijalankan oleh pengred bertauliah MPOB. Hakim perbicaraan dengan betul memutuskan bahawa hubungan di antara FELDA dan peneroka-peneroka adalah kontraktual dan ia bukan hubungan amanah (lihat perenggan 26–27).

(5) Perayu-perayu gagal memberikan apa-apa keterangan semasa

perbicaraan untuk menunjukkan bahawa setiap perayu telah menghantar FFB mereka ke kilang responden kedua. Hakim perbicaraan dengan wajar menilai keterangan yang relevan dan menyimpulkan bahawa perayu-perayu tidak mempunyai locus standi. Bantahan perayu-perayu terhadap dapatan hakim perbicaraan ini adalah salah anggap (lihat perenggan 18).

(6) Perayu-perayu gagal untuk membuktikan semasa perbicaraan bahawa setiap KPG adalah salah. Saksi-saksi perayu-perayu sendiri, apabila diperiksa balas, mengaku bahawa ia adalah dalam julat yang dinyatakan di dalam Manual Lembaga Minyak Sawit Malaysia (lihat perenggan 41).

(7) Perayu-perayu gagal untuk membuktikan fraud terhadap responden-responden atas imbangan kebarangkalian atau untuk mengemukakan tuntutan prima facie. Mereka juga gagal untuk membuktikan kuantum ganti rugi untuk tempoh tuntutan mereka kerana mereka gagal untuk membuktikan kuantiti FFB yang dikatakan dijual oleh setiap perayu-perayu kepada responden-responden atau untuk menujukkan 'shortfall' yang dikatakan di antara KPG 'proper' dan KPG yang diberikan atau untuk menunjukkan harga bulanan/harian FFB untuk peratusan kurangan bagi tempoh tuntutan tersebut (lihat perenggan 32 dan 53).]

Notes

For cases on appeal against judgment of High Court, see 2(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 940–960.

Cases referred to

Lembaga Kemajuan Tanah Persekutuan (FELDA) & Anor v Awang Soh bin Mamat & Ors [2009] 4 MLJ 610, CA (refd)

Lembaga Kemajuan Tanah Persekutuan (FELDA) lwn Ramli bin Abdul Rahman dan lain-lain dan satu lagi rayuan [2014] 4 MLJ 347; [2014] 7 CLJ 339, CA (refd)

PP v Mohd Radzi bin Abu Bakar [2003] MLJU 828; [2006] 1 CLJ 457, FC (folld)

Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd [2015] 5 MLJ 1, FC (folld)

Legislation referred to

Land Development Act 1956
Limitation Act 1953 ss 6, 22, 22(1)(a)
Public Authorities Protection Act 1948 s 2
Rules of Court 2012 O 59 r 16

Appeal from: Civil Trial No 22–219 of 2010 (High Court, Seremban)

Sivarasa Rasiah (T Kumar and Shahid Adli bin Kamarudin with him) (Daim & Gamany) for the appellants.
Mohd Hafarizam Harun (Cheng Mai, Nor Hazira bt Abu Haiyan, Ahmad Al Hady and Nurshafiqa Balqish bt Jaffri with him) (Hafarizam Wan & Aisha Mubarak) for the respondents.

Zamani A Rahim JCA:

INTRODUCTION

[1] In essence, the appellants' ('the plaintiffs') suit in the High Court filed on 9 August 2010 was based on a claim for fraud and conspiracy to defraud against the respondents ('the first and second defendants') as well as a claim for breach of trust by the first and second defendants in respect of the sale of oil palm fresh fruit bunches ('FFB') by the plaintiffs to the defendants.

TERMINOLOGY AND GENERAL INFORMATION RELEVANT TO THE SUIT

[2] For ease of reference, we set out below, a summary of the terminology and facts relevant to the oil palm industry to clarify some technical phrases and facts pertinent to the said industry in general:

(a) terminology:

(i) 'FFB' — fresh fruit bunches, also known in Bahasa Melayu as 'BTS' — *buah tandan segar*;

(ii) 'KPA' — *kadar perahan asas*, also known as basic extraction rate;

(iii) 'KPG' — *kadar perahan digred*, also known as graded extraction rate;

(iv) 'OER' — oil extraction rate, also known as *kadar perahan sebenar*;

(b) information on Malaysian Palm Oil Board ('MPOB'):

(i) prior to May 2000, there were two separate agencies which were known as PORLA (Palm Oil Registration and Licensing Authority) and PORIM (Palm Oil Research Institute of Malaysia), which were the governing authorities for the oil palm industry;

(ii) on first May 2000, these two separate agencies merged into one and became known as MPOB (Malaysian Palm Oil Board), which then became the governing authority for the oil palm industry; and

(iii) MPOB has two main divisions, namely (i) the research and development (R&D) division; and (ii) the services division, which consists of enforcement, licensing and economic departments;

(c) information on the MPOB/PORLA grading manual:

(i) the PORLA Fresh Fruit Bunch Grading Manual (1st Ed) was issued in 1993 — in English version and Bahasa Malaysia version in 1995; and

(ii) the MPOB Oil Palm Fruit Grading Manual (2nd Ed) was issued in 2003 — in Engish version and Bahasa Malaysia version in 2005;

(d) effective from 1 January 2006, by way of a *Government Gazette PU(A) 516 dated 31 December 2005 on the MPOB Regulations (Licensing) 2005*, condition 6 or the licence (which is applicable to the second defendant) states that 'a licensee shall *perform grading* on oil palm fruit received or purchased *based on MPOB Oil Palm Fruit Grading Manual* or any documents as may be determined by MPOB or *any system of grading as may be determined by the board*; and

(e) the MPOB Oil Palm Fruit Grading Manual itself, which is referred to in condition 6 or the licence, states at its foreword at page (vii) that:

> This manual is published as a *reference* especially for those that do not have their own grading schemes. For mills and estates that have their own grading schemes, this manual can serve as an alternative when they purchase fruits from outside suppliers.

BACKGROUND FACTS

[3] The plaintiffs are FELDA settlers from Serting, Jempol, Negeri Sembilan.

[4] The first defendant ('FELDA') is a statutory authority established under the Land Development Act 1956.

[5] The second defendant ('FPI') is a private limited company incorporated on 14 September 1995 and operates, inter alia, two palm oil mills, namely Kilang Sawit Serting and Kilang Sawit Serting Hilir.

[6] The suit involves FELDA Schemes in the following areas:

(a) Rancangan FELDA Serting Hilir 1, 2, 4–7 where each FELDA settler has ten acres of oil palm;

(b) Rancangan FELDA Raja Alias 1–3 where each FELDA settler has three acres of oil palm; and

(c) Rancangan FELDA Raja Alias 4 where each FELDA settler has seven acres of oil palm.

[7] All the palm oil trees in these schemes were planted in 1980/1981, and planting was completed in 1980/1981, save and except for Rancangan FELDA Raja Alias 4 and Serting Hilir 5 where planting was completed in 1982.

[8] Up until 1998, FPI adopted a system known as 'Sistem Kadar Perahan' for the sale and purchase of FFB, whereby the FFB purchases were paid based on the actual oil extraction rate of the mill regardless of the quality of the FFB sent to the mill.

[9] From March to September 1998, FPI introduced, in stages across the country, a new system, namely 'Sistem Baru Belian Buah Kelapa Sawit atau Buah Tandan Segar (BTS)'. Under this new system, which was also known as 'Sistem Belian Terus', the purchase of FFB was based on the daily CPO and kernel price. The final price of the FFB was to be determined according to the quality of the FFB delivered to the mill after grading was conducted and the KPG determined.

[10] KPG was determined based on the formula set out in grading manual (first issued by PORLA in 1993 and then by MPOB in 2003) which was:

> KPG (Graded Extraction Rate) = KPA (Base Extraction Rate) minus Penalty whereby the Penalty was determined in accordance with the grading process stipulated in the Grading Manual.

[11] On 9 August 2010, the plaintiffs commenced a suit against the defendants alleging:

(a) fraud and/or conspiracy to defraud in the sale and purchase of the oil palm and specifically, in reducing the KPG; and

(b) breach of trust.

[12] The plaintiffs are claiming from the defendants special damages based on the plaintiffs' output of oil palm and the price of FFB for every year from 1995 onwards, and are also claiming for general damages and exemplary damages for fraud and breach of trust.

THE DECISION OF THE HIGH COURT

[13] The learned High Court judge on 26 June 2016 dismissed the plaintiffs' claim. The findings of the learned High Court judge, inter alia, may be summarised as follows:

(a) the appellants ('the plaintiffs') failed to establish their locus standi to sue, as they have not proven that each and every plaintiff is a FELDA settler who sold FFB to the respondents ('the defendants');

(b) the plaintiffs failed to establish fraud against the defendants;

(c) the plaintiffs failed to establish the particulars of fraud as pleaded in para 21 of their amended statement of claim at all;

(d) the plaintiffs failed to establish that there was a conspiracy to defraud by the defendants. In this regard, the plaintiffs failed to plead or establish during trial any agreement between the defendants to defraud the plaintiffs and/or any agreement between the defendants to fraudulently reduce the KPG which is fundamental requisite for a claim in conspiracy to succeed;

(e) the plaintiffs failed to establish that there was a trust in existence between the plaintiffs and first defendants and further thereto, that there was a fraudulent breach of trust by the first defendant as trustee. It was necessary for the plaintiffs to first establish the three elements necessary to show a trust and this they failed to do;

(f) the plaintiffs' claim, which was filed in 2010 but sought to claim damages from 1995, is time barred by virtue of s 2 of the Public Authorities Protection Act 1948 vis a vis the first defendant, and/or s 6 of the Limitation Act 1953 vis a vis both the defendants. Further, the plaintiffs were not entitled to rely on s 22 of the Limitation Act 1953 as the plaintiff failed to establish an existence of a trust and/or also a fraudulent breach of trust;

(g) the plaintiffs were guilty of laches in pursuing their claim and this has prejudiced the defendants in their ability to properly defend the action;

(h) in any event, the plaintiffs have not established the quantum of damages purportedly suffered by the plaintiffs; and

(i) costs of RM1,000 to be paid by each plaintiff to the defendants.

MEMORANDUM OF APPEAL

[14] The plaintiffs are aggrieved with the High Court decision and are appealing to this court. A lengthy ground of appeal, consisting of 33 grounds are advanced in the *rekod rayuan tambahan* at pp 67–76 which read in extenso as follows:

(1) Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang apabila memutuskan untuk menolak tuntutan Perayu-perayu dengan kos;

Locus standi Perayu-perayu

(2) Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang apabila memutuskan Perayu-perayu telah gagal untuk membuktikan bahawa mereka mempunyai *locus standi* untuk menyaman Responden-responden apabila gagal membuktikan bahawa mereka adalah peneroka FELDA yang telah menghantar

hasil buah tandan sawit mereka ke kilang-kilang Responden Kedua kerana pengurus-pengurus rancangan-rancangan FELDA yang merupakan saksi-saksi Responden-responden tidak menyangkal fakta tersebut;

Isu had masa

(3) Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang apabila memutuskan PW1 hingga PW4 tidak mempunyai kuasa untuk memberikan keterangan untuk atau bagi pihak Perayu-perayu kerana:

(a) PW1 hingga PW4 telah di dalam keterangan lisan mereka menyatakan bahawa mereka mempunyai kuasa untuk memberikan keterangan bagi pihak Perayu-perayu; dan

(b) Responden-responden tidak mengemukakan sebarang saksi untuk menyangkal keterangan PW1 hingga PW4.

(4) Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang apabila memutuskan tuntutan Perayu-perayu adalah dihalang oleh s 2 Akta Perlindungan Pihak Berkuasa Awam 1948 kerana:

(a) Seksyen 2 Akta Perlindungan Pihak Berkuasa Awam 1948 tidak terpakai kepada Responden Kedua; dan

(b) Perayu-perayu masih boleh menuntut tempoh sehingga 3 tahun sebelum tuntutan Perayu-perayu difailkan.

(5) Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang apabila memutuskan tuntutan Perayu-perayu adalah dihalang oleh seksyen 6 Akta Had Masa 1953 kerana Perayu-perayu masih boleh menuntut untuk tempoh sehingga 6 tahun sebelum tuntutan Perayu-perayu difailkan;

(6) Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang apabila memutuskan seksyen 22 Akta Had Masa 1953 tidak terpakai terhadap tuntutan Perayu-perayu kerana tuntutan Perayu-perayu adalah inter alia melibatkan pelanggaran kewajipan fidusiari di mana kes *Ong Tok How & Anor v Madam Ong Lay Eng @ Ong Lay Len (Proposed administrator/Administrator for Ooi Koe Ley, wife of the deceased) & Ors* [2011] 3 MLJ 799 telah memutuskan seksyen 22 Akta Had Masa 1953 adalah terpakai;

(7) Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang apabila memutuskan Responden-responden telah bersalah kecuaian kelewatan (laches) di dalam tuntutan mereka kerana kecuaian kelewatan (laches) hanya terpakai kepada relif yang saksama (equitable relief) dan tuntutan Perayu-perayu adalah untuk gantirugi;

(8) Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang apabila memutuskan tindakan Perayu-perayu yang terus menjual buah tandan sawit mereka kepada Responden-responden merupakan estopel dan persetujuan (acquiescence) kerana gagal mengambilkira klausa 9 Surat Perjanjian dan klausa 13 Perjanjian Tanam Semula dan Pengurusan Kebun memerlukan Perayu-perayu perlu menjual buah tandan sawit mereka kepada Responden-responden;

(9) Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang apabila gagal

A mengambilkira bahawa memandangkan tuntutan Perayu-perayu difailkan pada tahun 2010, keterangan DW19 menunjukkan bahawa Responden-responden sepatutnya mempunyai dokumen-dokumen mereka sehingga tahun 2003.

Perlanggaran kewajipan fidusiari dan penipuan berasaskan ekuiti

B (10) Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang apabila memutuskan Responden-responden adalah bukan fidusiari kepada Perayu-perayu kerana:

(a) Responden Pertama telah menetapkan bahawa Perayu-perayu perlu menjual buah tandan sawit mereka ke Responden Kedua; dan

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(b) Responden-responden mempunyai kuasa penuh terhadap proses pengredan dan jual beli buah tandan sawit Perayu-perayu.

(11) Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang apabila memutuskan hubungan antara Perayu-perayu dan Responden-responden adalah D konraktual dan oleh itu tanggungjawab fidusiari tidak terbangkit kerana tanggungjawab fidusiari boleh berbangkit di dalam hubungan kontraktual;

(12) Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang apabila memutuskan bahawa standard pembuktian yang diperlukan untuk membuktikan penipuan adalah pembuktian melampaui keraguan munasabah kerana Mahkamah E Persekutuan di dalam kes *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd and another appeal* [2014] 1 MLJ 492 telah mengisytiharkan bahawa standard pembuktian yang terpakai adalah di atas imbangan kebarangkalian;

(13) Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang apabila gagal mengambilkira bahawa:

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(a) Manual Pengredan MPOB adalah standard minima yang perlu dipatuhi oleh Responden-responden;

(b) Tindakan Responden Kedua mengambilkira pencapaian setempat di dalam penentuan Kadar Perahan Asas adalah menyalahi Manual G Pengredan MPOB;

(c) Tindakan Responden-responden yang menggunakan angka Kadar Perahan Asas yang telah ditentukan terlebih dahulu iaitu KPA kilang untuk konsignan-konsignan yang dihantar oleh Perayu-perayu adalah menyalahi Manual Pengredan MPOB;

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(d) Angka Kadar Perahan Asas tidak dinyatakan di Akuan BTS walaupun ia adalah penting untuk perkiraan bayaran jual beli buah tandan sawit;

(e) Keputusan ujian makmal buah tandan sawit Perayu-perayu boleh diambilkira untuk menunjukkan potensi buah tandan sawit Perayu-perayu; dan

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(f) Tindakan Responden-responden yang menentukan terlebih dahulu purata berat tandan untuk konsignan-konsignan yang dihantar oleh Perayu-perayu adalah menyalahi Manual Pengredan MPOB.

(14) Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang apabila

gagal mengambilkira bahawa terdapat keterangan mencukupi untuk membuktikan aspek fakta-fakta di perenggan 12 di atas yang menunjukkan Responden-responden telah melakukan perlanggaran kewajipan fidusiari (breach of fiduciary duty) dan penipuan berasaskan ekuiti (equitable fraud) terhadap Perayu-perayu;

(15) Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang apabila gagal mengambilkira hujahan Perayu-perayu bahawa keterangan menunjukkan Responden-responden sebagai fidusiari telah melakukan penipuan berasaskan ekuiti (equitable fraud) kepada Perayu-perayu walaupun kes *Zung Wang Wood Products Sdn Bhd & Ors v Kwan Chee Hang Sdn Bhd & Ors* [2014] 2 MLJ 799 memutuskan bahawa plaintif boleh berjaya untuk tuduhan penipuan apabila penipuan seperti yang didapati oleh mahkamah perbicaraan itu tidak adalah penipuan seperti yang telah diplidkan;

(16) Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang apabila menghadkan dan hanya mengambilkira kausa-kausa tindakan yang dinyatakan di perenggan 1 alasan Penghakiman sedangkan keterangan menunjukkan terdapat perlanggaran kewajipan fidusiari (breach of fiduciary duty) dan penipuan berasaskan ekuiti (equitable fraud) oleh pihak Perayu-perayu;

(17) Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang apabila memutuskan Perayu-perayu tidak memplidkan sebarang pelanggaran kewajipan fidusiari dan butirannya kerana terdapat keterangan yang mencukupi dan oleh itu isu kekurangan butiran tidak terbangkit;

(18) Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang apabila gagal mengambilkira Perayu-perayu telah membuktikan kes prima facie untuk perlanggaran kewajipan fidusiari (breach of fiduciary duty) dan penipuan berasaskan ekuiti (equitable fraud) yang tidak disangkal oleh Responden-responden;

(19) Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang apabila memutuskan angka Kadar Perahan Asas adalah sentiasa berada di dalam julat angka berdasarkan umur pokok yang dinyatakan oleh Jadual 1 untuk Manual Pengredan MPOB kerana keterangan menunjukkan kriteria yang digunakan oleh Responden-responden adalah purata berat tandan dan bukannya umur pokok;

(20) Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang apabila memutuskan tuntutan Perayu-perayu bahawa Responden-responden telah memberikan angka Kadar Perahan Gred yang salah kerana angka kadar Perahan Asas salah adalah tidak boleh dikekalkan, tidak berasas dan tidak dibuktikan kerana Responden-responden tidak mengikut Manual Pengredan dan sewenang-wenangnya menentukan angka Kadar Perahan Asas;

(21) Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang apabila gagal mengambilkira isu di dalam kes ini adalah Kadar Perahan Asas tidak dinyatakan di Borang Akuan BTS dan disembunyikan oleh Responden-responden oleh itu angka itu tidak diketahui oleh Perayu-perayu;

(22) Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang apabila memutuskan Perayu-perayu cuba menggunakan laporan ujian makmal mereka untuk menuntut jumlah Kadar Perahan Gred sebanyak 25.3%–25.57% sedangkan

Perayu-perayu hanya menghujahkan bahawa laporan ujian makmal menunjukkan potensi buah tandan sawit Perayu-perayu;

(23) Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang apabila gagal mengambilkira keterangan yang menunjukkan Responden Pertama telah memilih Responden Kedua (yang merupakan anak syarikat kepunyaan 100% Responden Pertama) untuk menerima buah tandan sawit daripada Perayu-perayu dan Responden Kedua kemudiannya akan menggred dan membayar untuk buah tandan sawit Perayu-perayu adalah bukti pakatan sulit (collusion) antara Responden-responden;

(24) Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang apabila gagal mengambilkira Perayu-perayu adalah bergantung kepada belas ihsan (at the mercy) Responden-responden di dalam transaksi jual beli buah tandan sawit kerana Responden-responden mempunyai kuasa penuh di dalam proses pengredan dan jual beli buah tandan sawit;

Status Manual Pengredan

(25) Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang apabila memutuskan pematuhan Manual Pengredan MPOB adalah tidak mandatori dan ia adalah hanya rujukan di dalam urusan jual beli buah tandan sawit kerana:

(a) Responden Kedua telah mengkomitkan diri mereka semenjak 1998 untuk menggunakan Manual Pengredan MPOB di dalam urusan jual beli buah tandan sawit;

(b) Manual Pengredan MPOB adalah wajib dipatuhi semenjak tahun 2006 mengikut Syarat No 6 Syarat-syarat bagi Pemegang Lesen dalam Kategori Kilang Buah Kelapa Sawit untuk Jadual Keenam untuk Peraturan-peraturan Lembaga Minyak Sawit Malaysia (Pelesenan) 2005;

(c) Berdasarkan perenggan (b) di atas, keterangan DW1 adalah tidak kredibel dan sepatutnya tidak diterima; dan

(d) Manual Pengredan adalah bukannya menentukan kadar perahan maksimum minyak tetapi adalah standard minimum yang perlu dipatuhi oleh Responden-responden.

Kredibiliti saksi-saksi

(26) Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang apabila memutuskan PW2 adalah bukan saksi bebas dan tidak mempunyai kelayakan untuk memberi keterangan mengenai Kadar Perahan Gred kerana:

(a) Tiada sebab diberikan kenapa PW2 adalah bukannya saksi bebas; dan

(b) PW2 adalah bekas pegawai MPOB yang mempunyai pengetahuan mengenai Kadar Perahan Gred.

Kuantum

(27) Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang apabila memutuskan Perayu-perayu telah gagal membuktikan kuantum gantirugi kerana Perayu-perayu telah menyediakan satu jadual di Lampiran kepada Hujahan Pasca

Perbicaraan mengenai jumlah kerugian Perayu-perayu dan jadual tersebut mengambilkira antara lain angka purata pengeluaran buah tandan sawit setiap peneroka yang disediakan sendiri oleh saksi-saksi Responden-responden;

(28) Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang apabila memutuskan tiada keterangan daripada setiap Perayu-perayu berapakah jumlah buah tandan sawit yang dihantar ke Responden-responden kerana kes *Lembaga Kemajuan Tanah Persekutuan (FELDA) & Anor v Awang Soh bin Mamat & Ors* [2009] 4 MLJ 610 memutuskan bahawa tiada keperluan tersebut kerana di dalam skim FELDA kesemua peneroka-peneroka bersetuju untuk menjual buah tandan sawit mereka kepada Responden Kedua dan hasilnya akan dikongsi dengan Responden Pertama;

(29) Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang apabila memutuskan bahawa Perayu-perayu adalah tersilap untuk bergantung kepada angka purata pengeluaran buah tandan sawit oleh peneroka-peneroka yang disediakan oleh pengurus-pengurus rancangan FELDA walaupun mereka adalah saksi-saksi untuk pihak Responden-responden sendiri;

(30) Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang apabila memutuskan bahawa Perayu-perayu telah mendakwa bahawa keseluruhan Perayu-perayu berhak mendapat 113 tan setahun kerana Perayu-perayu di dalam pengiraan kuantum gantirugi telah mengambilkira dan menggunakan angka purata pengeluaran buah tandan sawit oleh peneroka-peneroka yang diberikan sendiri oleh saksi-saksi Responden-responden;

(31) Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang apabila gagal mengambilkira bahawa Responden-responden mempunyai kuasa penuh di dalam proses pengredan dan jual beli buah tandan sawit tetapi tidak mengemukakan sebarang dokumen-dokumen untuk menyangkal dakwaan Perayu-perayu mengenai kuantum gantirugi mereka;

Kos

(32) Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang apabila memutuskan setiap Responden-responden perlu menanggung kos sebanyak RM1,000.00 kerana ia adalah liabiliti bersama dan berasingan (joint and several liability) oleh itu perlu diberikan satu jumlah sekaligus (lump sum amount);

(33) Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang apabila memutuskan untuk memberi jumlah kos yang adalah terlalu tinggi (manifestly excessive) kepada Responden-responden kerana inter alia jumlah kos keseluruhan adalah sebanyak RM372,000.00.

[15] In his written submission dated 15 February 2016, learned counsel for the plaintiffs summarised the grounds of appeal into four grounds namely:

(a) the plaintiff's claim are for continuing damage and injury and therefore limitation period has not started to run, or in any event has not set in;

(b) the learned High Court judge had failed to consider the clear documentary and oral evidence that shows the defendants had committed breach of fiduciary duty and equitable fraud;

(c) the plaintiffs had presented a prima facie case which was not rebutted by the defendants, who remained in control and possession of all necessary information to rebut the plaintiffs case; and

(d) on the issues of locus standi and quantum of damages, the case of *Lembaga Kemajuan Tanah Persekutuan (FELDA) & Anor v Awang Soh bin Mamat & Ors* [2009] 4 MLJ 610 had held that not all the plaintiffs need to give evidence.

OUR CONSIDERATION AND DECISION

We shall deal with issue (d) first, followed by issues (b) and (c) together and (a).

Locus standi of the plaintiffs

[16] The plaintiffs' submitted that their witnesses (in particular PW1 and PW3) had affirmed on oath that they were authorised to give evidence on behalf of all the plaintiffs.

[17] The learned judge was said to have misdirected herself by treating the warrants to act which were an appointment of the solicitors as the equivalent of the plaintiffs giving authority to a particular the plaintiff to give evidence on behalf of themselves in court which is a separate matter. Therefore any technical defects (if at all) in those warrants to act did not affect the locus standi of the plaintiffs' chosen witnesses in court to give evidence on behalf of all or some of them.

[18] The plaintiffs' contention that the learned High Court judge's finding that they had no locus standi, in our view, was misconceived. The issue of whether the plaintiffs had sold FFB to the second defendants mill was an issue to be tried as set out in the list of issues to be tried, and in this regard, the plaintiffs failed to provide any evidence whatsoever during trial to show that each and every the plaintiff had sent FFB to the mill. In the grounds of judgment at paras 14–22, Her Ladyship had duly evaluated the relevant evidence relating to locus standi and concluded that the plaintiffs had no locus standi.

Allegation of breach of fiduciary duty and equitable fraud

[19] The plaintiffs contended that the first defendant's statutory obligations show the fiduciary nature of the relationship between FELDA and the settlers

under their care. Their relationship cannot be said as one commercial party dealing with another commercial party at arm's length and on equal footing. The plaintiffs have to send their FFB to the mill decided by the defendants. A

[20] As for the second defendant, the plaintiffs further argued, they share the same objectives and obligations as the first defendant. The fact that it was not pleaded that the second defendant is a fiduciary would not preclude such finding to be made. B

[21] Hence, the second defendant along with the first defendant should be held as a fiduciary to the plaintiffs and therefore it is incumbent on the defendants to protect and act in the best interest of the plaintiffs who are FELDA settlers. C

[22] As fiduciaries, both the defendants owe a duty of care to the plaintiffs to act in the best interest of the plaintiffs. The standard to assess the defendants is the manual as it is the minimum standard in the palm oil industry which has to be adhered to by all relevant parties. D

[23] The plaintiffs also submitted that the learned High Court judge erred in holding that the plaintiffs are estopped from submitting on a breach of fiduciary duty as even though fiduciary duty was pleaded, a breach of that duty was not pleaded. This is because the plaintiffs are adopting the particulars for fraud as also the particulars for breach of fiduciary duty. E

F

[24] Furthermore, the learned High Court judge also failed to consider that the clear evidence elicited from the defendants' witnesses show that the defendants did not comply with the *Manual Penggredan* and thus a breach of fiduciary duty by the defendants.

G

[25] In essence, the plaintiffs are contending that a fiduciary duty is borne because the plaintiffs have been dictated to sell the FFB to the second defendant and that the defendants have full control over the grading process and the sale and purchase transaction of the FFB.

H

[26] We wish to emphasise here that the plaintiffs' statement of claim never pleaded a breach of fiduciary duty. At all times, the claim in the statement of claim was for a purported breach of trust, as expressly pleaded at para 26(ii) of the statement of claim which states 'pecah amanah', and never was there a claim of breach of fiduciary duty. This, we felt, had caused prejudice to the defendants as the plaintiffs' pleaded causes of action were fraud, conspiracy to defraud and breach of trust. The learned High Court judge had duly considered the purported claim of breach of fiduciary duty and essentially held that the plaintiffs are estopped from making such submissions as parties are I

bound by their pleadings. In any event, the defendants do not owe the plaintiffs any fiduciary duty in the sale and purchase of FFB. The obligation to sell the FFB to a mill selected by the first defendant is contained in cl 9 of the *surat perjanjian* and the grading is conducted by MPOB certified graders.

[27] With regard to item 11 of the memorandum of appeal, the learned High Court judge had correctly decided that the relationship between FELDA and the settlers was contractual and not a trust relation. Her Ladyship based on the decision of this court in *Lembaga Kemajuan Tanah Persekutuan (FELDA) lwn Ramli bin Abdul Rahman dan lain-lain dan satu lagi rayuan* [2014] 4 MLJ 347; [2014] 7 CLJ 339 where this court said:

> [37] Kedua, peserta-peserta (atau lebih dikenali dengan peneroka-peneroka) rancangan tanah berkelompok di bawah GSA adalah mereka yang terpilih. Syarat utama penyertaan mereka ialah mereka hendaklah menandatangani suatu perjanjian untuk menyertai rancangan pembangunan tanah berkelompok di bawah GSA dengan perayu. Responden adalah merupakan peserta-peserta yang telah dipilih dan telah menandatangani perjanjian tersebut rancangan tanah berkelompok dengan perayu. Adalah satu fakta yang nyata bahawa perjanjian tersebut tidak diperuntukkan di dalam mana-mana peruntukan GSA. *Oleh yang demikian, terdapat dua jenis hubungan antara perayu dan responden. Pertama ialah hubungan kontraktual berdasarkan kepada perjanjian yang telah ditandatangan*. Kedua ialah hubungan responden dengan perayu berkaitan dengan syarat-syarat pemilikan tanah rancangan berkelompok yang diberikan kepada responden berdasarkan kepada peruntukan-peruntukan di dalam GSA dan juga KTN.

[28] However, the plaintiffs further submitted that as the defendants are fiduciaries to the plaintiffs, the defendants are also guilty of *equitable fraud* against the plaintiffs.

[29] The plaintiffs had also complained that the defendants, by using the predetermined KPA kilang system were passing to the plaintiffs the losses caused by their inefficient mills. Therefore, they have acted in a manner which is adverse or contrary to the interest of the plaintiffs who are their principals and that is an *equitable fraud* perpetrated against the plaintiffs.

[30] It was also complained that the learned High Court judge had also erred and misdirected herself in holding that the standard of proof to be applied to see whether fraud has been committed by the defendants is beyond reasonable doubt. This is contrary to the decision of the Federal Court in *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1 where the burden is on balance of probabilities.

[31] We are of the considered view that the applicable standard of proof that this court hearing this appeal is the newly pronounced standard in the

Sinnaiyah & Sons Sdn Bhd case, namely the standard of proof on the balance of probabilities. We are guided by the apex court decision of *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2003] MLJU 828; [2006] 1 CLJ 457 through the speech of learned Justice Abdul Malek Ahmad FCJ (as he then was), whereby it was ruled as follows:

> To my mind, the correct proposition would be that any decision made, without the necessity of a prospective ruling, can apply only to pending cases irrespective of whether at first instance or *at the appellate stage*. It certainly does not apply to cases already disposed of at the highest appellate level. (Emphasis added.)

[32] Having so ruled, we are of the view that even on the lower burden on balance of probabilities, the plaintiffs's have failed in their claim to prove fraud against the defendants. The plaintiffs had not succeeded to present a prima facie claim against both the defendants.

Allegation of non-rebuttal of a prima facie case by the defendants

[33] The plaintiffs, at items 13 and 14 of the memorandum of appeal, set out the allegations of a *breach of fiduciary duty* and *equitable fraud*. *Minimum Standards of the MPOB Grading Manual* — The MPOB Grading Manual itself expressly states that: (a) it is merely a reference/guide; and (b) in so far as KPA is concerned, that the KPA stated in the MPOB Manual is the maximum theoretical extraction rate. At para 5.3 of the MPOB Grading Manual States: 'Basic Extraction Rate is the theoretical rate which is also the *maximum* extraction rate of the oil and Kernel'. Therefore, the plaintiffs, contention that the MPOB Manual is the minimum standards for KPA is without merit.

[34] 'Pencapaian Setempat' — The taking into account of the local achievement (pencapaian setempat) of the mill in determining the KPA is not in contravention of the MPOB Manual. The manual provides a range of KPA, eg for trees between 4–18 years old, the KPA range is 20–21% and for trees over 18 years is 19–20%. It was established at trial that the second defendant used three criteria to determine the KPA, namely, the age of trees, average weight of FFB as well as 'pencapaian setempat'. Whilst the manual states that KPA can be based either on age of trees or average weight of the FFB, there is no prohibition on a FFB purchaser to also include additional factors to determine the KPA. In any event, at all material times, the KPA given by the second defendant was within the range set out in the manual.

[35] 'KPA determined based on age of trees' — It is untrue that in using a pre-determined KPA for the FFB consignments, it contravened the MPOB Manual. The manual expressly allows the KPA to be determined by either average bunch weight or age of trees. The manual also states that in cases where FFB suppliers' age of trees is known, the age of trees of the FELDA settlers'

plantations is already known and therefore the KPA is pre-determined based on the known information. The year of planting does not change on a daily basis. As a matter of fact, all the plantation of the FELDA schemes involved trees over the age of 18 years old, and in this regard the KPA is 19–20% as stipulated in the MPOB Grading Manual.

[36] 'KPA is not stated on the Akuan Penerimaan BTS' — Whilst the KPA is not expressly printed on the Akuan Penerimaan BTS, the KPG and all the penalties are printed on the Akuan Penerimaan BTS and therefore, one could quite easily determine the KPA by calculating backwards. The formula is KPG = KPA minus penalty. Therefore, with the KPG and penalty known and shown, one can calculate the KPA using the manual.

[37] 'The lab report can be used to show the potential of the fruit' — The plaintiffs reliance on the oil to bunch ration of a single selected bunch from a laboratory analysis to support their claim of what the 'proper' KPG ought to be for the 15 year period is completely flawed in the technical, legal and practical sense. This has been supported by the testimony of various independent witnesses called by the defendants.

[38] Further, the plaintiffs' attempt to claim a KPG in the region of 25% as pleaded in para 23 of their statement of claim is mischievous. This is because the Malaysian Palm Oil Statistics reveal that the range of the oil extraction rate for Negeri Sembilan (where the claim relates to) from 1990–2010 is between 18% and 20%, with a median of 18.95%.

[39] 'Determining the average bunch weight' — The plaintiffs are insisting that the second defendant is only entitled to use the average bunch weight to determine the KPA, when in fact the manual expressly allows KPA to be determined by age of trees. All the trees in this suit are aged more than 18 years old, which would put the KPA squarely in the range of 19–20% as prescribed by the MPOB Grading Manual for trees more than 18 years old.

[40] 'KPA based on age of trees' — The plaintiffs are entirely incorrect when they keep insisting that one *must* use the average weight, when the manual itself clearly allows for the age of trees to be used.

[41] 'KPA purportedly not in accordance with manual' — The plaintiffs had completely failed to establish during trial that any of the KPG were wrong. Ultimately the plaintiffs own witnesses themselves, when cross-examined on the 'Akuan Penerimaan BTS' which sets out the KPG admitted that it was within the range of the MPOB Manual.

[42] 'KPA not stated in the *Akuan Penerimaan* BTS and was purportedly

'concealed' — Although the KPA is not printed on the *Akuan Penerimaan* BTS, it can be calculated based on the information on the AkuanPenerimaan BTS read with the manual. Further, any FELDA settler would be able to find out the KPA by asking the mill manager or personnel, their own scheme manager or their *ketua wakil peneroka* who sits in the JCC Committee.

[43] 'Purported collusion between the defendants' — The first defendant had selected the second defendant to purchase the FFB from the plaintiffs is proof of collusion. Such a contention is without merit. Clause 9 of the surat perjanjian and cl 13 of the *perjanjian tanam semula* gives the first defendant a contractual right to stipulate which mill the plaintiffs are to send their FFB to. Such a contractual arrangement cannot amount to collusion.

[44] 'Purportedly at the mercy of the defendants' — At the outset, all the grading is conducted by MPOB certified graders. Therefore, it is a standardised process which takes place during every consignment. It is not an arbitrary grading process. There is also no complaint by the plaintiffs on the grading. Further, on the evidence of the plaintiffs' witnesses themselves they had chosen to send their FFB to the Mills stipulated by the first defendant, as it would incur higher cost to them to sell their FFB elsewhere.

[45] 'Status of the MPOB Grading Manual' — It is clear that MPOB Grading Manual is merely a reference and millers are allowed to use their own grading system. The MPOB Oil Palm Fruit Grading Manual itself states in its foreword at p (vii) that:

> This manual is published as a *reference* especially for those that do not have their own grading schemes. For mills and estates that have their own grading schemes, this manual can serve as an alternative when they purchase fruits from outside suppliers. (Emphasis added.)

Limitation and laches

[46] Learned counsel submitted that the complaint by the plaintiffs regarding the use of the system of predetermined *purata berat tandan* and predetermined KPA *kilang* system is a continuing equitable fraud and/or breach of fiduciary duty by the defendants. Therefore, no limitation period has started to run against the plaintiffs.

[47] The appellants also should at the very least be able to claim for the period of up to six years before the writ was filed on August 2010.

[48] Furthermore, the plaintiffs' claim for breach of fiduciary duty lies in the realm of law of trusts and therefore, the defendants' defence of laches ought not to succeed.

[49] The learned High Court judge had dealt extensively with the issue of limitation at paras 29–58 of her grounds of judgment. A plain reading of her grounds shows that she had duly and properly confined the application of s 2 of the Public Authorities Protection Act 1948 to the first defendant and *not* to the second defendant.

[50] The plaintiffs' cause of action against the first and second defendant is statute barred by virtue of s 6 of the Limitation Act 1953 as the plaintiffs' action is for fraud and/or conspiracy to defraud, which is a tortious action where the six year limitation applies.

[51] We note that the plaintiffs have never pleaded a claim for 'breach of fiduciary duty' in the statement of claim, though the plaintiffs contend that the learned High Court judge erred in holding that s 22 of the Limitation Act did not apply. The express words of s 22(1)(a) of the Limitation Act deal with a *fraudulent breach of trust* and the plaintiffs have not established any breach of trust, let alone a fraudulent breach of trust. Thus, the learned High Court judge correctly and properly recognised that s 22(1)(a) was not applicable.

[52] Section 22 of the Limitation Act clearly recognises that the court has equitable jurisdiction to refuse relief on the ground of laches. The learned High Court judge correctly recognised that the plaintiffs in commencing their claim in 2010 for matters that purportedly went as far back as 1995 or 1998, have prejudiced the defendants' position as the defendants have lost the evidence necessary for meeting the claim. Further, the plaintiffs had slept on their rights. Although it was disclosed during trial that as early as 13 August 2001, PW1 had lodged a police report with allegations that the second defendant had fraudulently reduced the KPG, however, no suit was instituted and the plaintiffs waited nine years to lapse before they commenced this action against the defendants.

QUANTUM AND COSTS

[53] On due perusal of the evidence, the plaintiffs had completely failed to establish quantum for their period of claim because they had:

(a) failed to prove the quantity of FFB purportedly sold by each plaintiff to the defendants;

(b) failed to show the purported 'shortfall' between the 'proper' KPG and KPG given; and

(c) failed to show the monthly/daily price of FFB for the percentage (%) of shortfall for the period of claim.

[54] As regards to costs awarded, it was not on a joint and several basis. The

costs of RM1,000 was ordered to be paid by each plaintiff to the defendants. Thus, the plaintiffs' contention that costs was awarded on a joint and several basis is plainly misconceived.

[55] On the issue that the costs (RM370,000 in total) being excessive is also misconceived. The High Court judge took into consideration factors within O 59 r 16 of the Rules of Court 2012 regarding the basis assessment of damages.

CONCLUSION

[56] In conclusion, there is no appealable error committed by the learned High Court judge to warrant our appellate intervention. We agree that the trial judge had correctly and properly decided the matter in the High Court. None of the grounds of appeal canvassed by the plaintiffs before us have any merit.

[57] Accordingly, we unanimously dismissed the plaintiffs' appeal with costs. Costs of RM100,000 (global) to be paid by the plaintiffs to the defendants, subject to allocator fee. We also order that the deposit be refunded to the plaintiffs.

Appeal dismissed with costs.

Reported by Ashok Kumar